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Artificial Insemination behind Bars: The Boundaries of Due Process

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ARTIFICIAL INSEMINATION BEHIND BARS: THE BOUNDARIES OF DUE PROCESS

I. INTRODUCTION

On May 23, 2002, in *Gerber v. Hickman*,[1] the en banc court for the Ninth Circuit held that the fundamental right to procreate was inconsistent with the nature of incarceration.[2] In so holding, the court overturned an earlier decision by the Ninth Circuit Court of Appeals that the constitutional right of procreation survives incarceration.[3] Because the latest decision by the court relies on a ruling by a widely divided court,[4] questions have arisen regarding the correct analysis for determining whether a fundamental right endures imprisonment.

II. COURTS REVIEW PRISONERS' FUNDAMENTAL RIGHT TO PROCREATE

A. Gerber's Claim

William Gerber is serving a life sentence without the likelihood of parole.[5] Pursuant to California's three strikes law, his sentence stemmed from his conviction in 1997 for discharging a firearm and making terrorist threats.[6] Gerber and his wife wanted to have a child, and time was of the essence since his wife was already forty-four years old.[7] Since Gerber did not have the right to conjugal visits and was unlikely to get parole, he wished to impregnate his wife by artificial insemination.[8] Gerber requested that:

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1. 291 F.3d 617 (9th Cir. 2002).
2. *See id.* at 623.
3. *See* Gerber v. Hickman, 264 F.3d 882, 890 (9th Cir. 2001), *rev'd en banc*, 291 F.3d 617 (9th Cir. 2002).
4. *See Gerber*, 291 F.3d at 617.
5. *See* Gerber v. Hickman, 103 F. Supp. 2d 1214, 1216 (E.D. Cal. 2000).
6. *See Gerber*, 264 F.3d at 884.
7. *See Gerber*, 103 F. Supp. 2d at 1216.
8. *See id.*

> (1) [A] laboratory be permitted to mail him a plastic collection container at the prison along with a prepaid return mailer, (2) he be permitted to ejaculate into the container, and (3) the filled container be returned to the laboratory in the prepaid mailer by overnight mail. Alternatively, [he] requests that his counsel be permitted to personally pick up the container for transfer to the laboratory or health care provider.[9]

Even though Gerber was willing to pay all costs for the procedure, the prison warden, Robert Hickman, denied his request.[10] Gerber claims that the warden's denial violated his constitutional right to procreate.[11]

B. Procedural History

Gerber filed a complaint in the Eastern District Court of California. The district court first determined, pursuant to *Planned Parenthood v. Casey*,[12] that the right to procreate is a fundamental right.[13] Relying on *Turner v. Safley*,[14] the court further found that "[n]ot all rights, however, survive incarceration, and even those that do are subject to significant restrictions."[15] Finally, the district court relied on the reasoning in *Anderson v. Vasquez*[16] and *Goodwin v. Turner*[17] and held that the right to procreate does not survive incarceration.[18] Consequently, the district court dismissed Gerber's complaint.[19]

Gerber appealed the district court's decision to the Ninth Circuit. The court of appeals reviewed the district court's decision and employed a two-step analysis to determine whether Gerber's

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9. *Id.*
10. *See id.*
11. *See id.* Gerber asserts that his constitutional right stems from the Due Process Clause of the Fourteenth Amendment.
12. 505 U.S. 833 (1992).
13. *See Gerber*, 103 F. Supp. 2d at 1216.
14. 482 U.S. 78 (1987).
15. *Gerber*, 103 F. Supp. 2d at 1216.
16. 827 F. Supp. 617, 618 (N.D. Cal. 1992).
17. 702 F. Supp. 1452 (W.D. Mo. 1988).
18. *See Gerber*, 103 F. Supp. 2d at 1216–18.
19. *See id.* at 1218.

substantive due process rights were violated.[20] First, the appellate court decided whether the right to procreate is a fundamental right "'[consistent] with [Gerber's] status as a prisoner.'"[21] Second, if the court found that the fundamental right survived incarceration, the question was "whether there are legitimate penological interests which justify the prison's restriction of the exercise of that fundamental right."[22]

Using this two-step analysis, the court of appeals found that the right to procreate is a fundamental right[23] and that it survives incarceration.[24] The appellate court inferred the survival of procreation from the decisions in *Turner* and *Skinner v. Oklahoma*.[25] *Turner* held that the right to marry survives incarceration (with some restrictions),[26] and *Skinner* held that sterilization is unconstitutional because prisoners are able to maintain their procreative abilities once they are released from prison.[27] The court found that these cases support the idea that procreation is retained in some form while in prison.[28]

The court of appeals then assessed whether the governmental interests that the warden articulated fit within the *Turner* test. Specifically, the court asked whether legitimate penological interests existed that were reasonably related to the prison prohibition of artificial insemination.[29] The *Turner* court listed four factors to determine the reasonableness of the interests.[30] The first factor was whether there was a "valid, rational connection" between the

20. *See* Gerber v. Hickman, 264 F.3d 882, 886 (9th Cir. 2001).
21. *Id.* (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).
22. *Id.* at 887.
23. *See id.* (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977); Stanley v. Illinois., 405 U.S. 645, 651 (1972); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
24. *See id.* at 889.
25. *See id.*
26. *See Turner*, 482 U.S. at 81.
27. *See Skinner*, 316 U.S. at 541.
28. *See Gerber*, 264 F.3d at 888–89.
29. *See id.* at 890.
30. *See Turner*, 482 U.S. at 89–91 (deciding that the governmental interests the warden cited to did not meet the first factor of the Turner test and, therefore, the court did not need to analyze the other three factors). *But see Gerber*, 264 F.3d at 892.

prohibition and the interest.[31] The governmental interests that the warden articulated were equal treatment of men and women prisoners, safety risks, and cost concerns due to the threat of lawsuits.[32]

1. First factor: gender equality

The warden argued that treating men and women equally requires granting women the right to artificially inseminate. This would be both costly and create other "'obvious' and 'prohibitive' burdens."[33] The court of appeals, however, did not have to deal with the merits of the warden's claim. The court took the position that men and women can be treated equally in this instance because "the two sexes are not similarly situated."[34] The appellate court narrowly tailored Gerber's request. The court interpreted the request as providing semen in a cup, which is something a woman cannot request.[35]

2. Second factor: security

The court of appeals reasoned that the warden's security concern that prisoners would misuse the semen seemed argumentative.[36] However, there is no real threat of prisoners throwing their semen on other inmates or guards or sending their semen through the mail to an unsuspecting individual.[37] In fact, Gerber's lawyer offered to pick up the container from the prison and deliver it to the laboratory.[38]

3. Third factor: cost

Lastly, the court of appeals held that the interest of cost was not legitimate because there was no evidence that women would bring costly lawsuits claiming the right to be artificially inseminated while in prison.[39] Further, the court took the position that banning a

31. *Turner*, 482 U.S. at 89.
32. *See Gerber*, 264 F.3d at 890.
33. *Id.* at 891.
34. *Id.*
35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.*
39. *See id.*

constitutional right due to fear of an increase in lawsuits is reprehensible.[40]

Thus, the court held that the warden's rationales were not "'reasonably related to legitimate penological interests' . . . [and] there [was] no 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[41] The court of appeals reversed the lower court and remanded for further consideration.[42]

III. THE COURT OF APPEALS REHEARING EN BANC

The court of appeals' decision incited negative reactions.[43] Consequently, the decision was vacated and reheard by the en banc court in order to determine whether inmates have a fundamental right to procreate. The en banc court agreed that the two-part analysis that the court of appeals employed is applicable.[44] Thus, the court first determined "whether the right to procreate is fundamentally inconsistent with incarceration."[45] If so, then the regulation would stand.[46] If not, then the question would be whether "the prison regulation abridging that right [is] reasonably related to legitimate penological interests."[47]

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40. *See id.* at 891–92.

41. *Id.* at 892 (citations omitted).

42. *See id.* at 892–93.

43. "The California Attorney General's office said this ruling has 'cast the lower courts into hopeless conflict, created a right that is unprecedented under Supreme Court case law, and triggered ramifications that will far exceed the bounds of the case.'" Sarah L. Dunn, Note, *The "Art" of Procreation: Why Assisted Reproduction Technology Allows For the Preservation of Female Prisoners' Right to Procreate*, 70 FORDHAM L. REV. 2561, 2592 (2002) (quoting Greg Krikorian, *State Fights Procreation for Prison Inmates Courts: Lockyer Moves to Block an Appellate Ruling on Artificial Insemination, Saying the U.S. Supreme Court Should Decide Case*, L.A. TIMES, Sept. 13, 2001 at B1).

44. *See* Gerber v. Hickman, 291 F.3d 617, 620 (9th Cir. 2002).

45. *Id.*

46. *See id.*

47. *Id.*

A. Looking at Case Law: Does the Right to Procreate Apply to Prisoners?

In determining whether the right to procreate survives incarceration, the en banc court first established that prisoners have fundamental rights, but that restrictions on these rights may be necessary.[48] The court then looked at *Roberts v. United States Jaycees*,[49] which held that the right of intimate association is restricted in the prison setting.[50] This case established that a prisoner has no right to conjugal visits. The court also reviewed the holding in *Goodwin v. Turner*,[51] a case involving a similar request as that of Gerber. In *Goodwin*, a prison inmate sought assistance in artificially inseminating his wife.[52] The *Goodwin* court decided, as discussed in *Turner v. Safley*,[53] that "[a]rtificial insemination, as a method of begetting a child, [fell] within [the] realm of unavailable 'incidents of marriage.'"[54]

The court also rebutted the earlier decision that *Skinner* and *Turner*, taken together, lead to the presumption that inmates have the right to procreate.[55] *Skinner* held that prisoners cannot be forced into surgical sterilization,[56] but the court took the position that this does not mean they can procreate while still in prison.[57] Further, the court

48. *See id.* "'[W]hile persons imprisoned . . . enjoy many protections of the Constitution, it is also clear that imprisonment carries with it the . . . loss of many significant rights.'" *Id.* (quoting Hudson v. Palmer, 468 U.S. 517, 524 (1984)); *see, e.g.*, Pell v. Procunier, 417 U.S. 817, 822 (1974); Turner v. Safley, 482 U.S. 78, 84 (1987).

49. 468 U.S. 609 (1984).

50. *See id.* at 617–18.

51. 702 F. Supp. 1452 (W.D. Mo. 1988).

52. *See id.*

53. *Turner* discussed incidents of marriage that survive incarceration such as emotional support, exercise of religious and spiritual faith, personal dedication to spouses, and receipt of governmental benefits. *Turner* also determined that, since most inmates will get out of prison on parole, the expectation that the marriage will eventually be consummated is an incident of marriage. *See* 482 U.S. at 95–96. *Goodwin* implied from this language in *Turner* that incarceration restricts the right to procreate. *Goodwin*, 702 F. Supp. at 1454.

54. *Goodwin*, 702 F. Supp. At 1454.

55. *See* Gerber v. Hickman, 291 F.3d 617, 622–23 (9th Cir. 2002).

56. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

57. *See Gerber*, 291 F.3d at 622.

held that *Turner* made it clear that marriage must be restricted with regard to its physical aspects.[58] Accordingly, the court found that the right to procreate does not survive incarceration.[59]

B. Policy Considerations

Additionally, the court looked at policy reasons such as deterrence, rehabilitation, and isolation in making its decision that procreation is inconsistent with imprisonment.[60] Although the court never stated why prohibiting artificial insemination serves these penological objectives, it cited *Hudson v. Palmer* and *State v. Oakley* for its determination that restrictions on procreative rights serve these goals.[61] The court also addressed the nature of artificial insemination.[62] The court adopted the position that the ease or difficulty of artificial insemination is not consistent with the goals of the penal system for deterrence purposes.[63]

The court did not need to consider the second part of the analysis since it found the right to be inconsistent with imprisonment.[64] Thus, the court held that the right to procreate via artificial insemination does not survive incarceration.[65]

IV. CRITICISM OF THE COURT'S DECISION

A. What the Court Should Have Done: Applied One Test

While the en banc court's conclusion may be sound, its reasoning is somewhat suspect. Following precedent, the court

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58. *See id.* at 623.
59. *See id.*
60. *See id.* at 622.
61. *See id.* at 621. "'[T]he curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities . . . .'" *Id.* (quoting Hudson v. Palmer, 468 U.S. 517, 524 (1984)). "'[I]ncarceration, by its very nature, deprives a convicted individual of the fundamental right to be free from physical restraint,' and this 'in turn encompasses and restricts other fundamental rights, such as the right to procreate.'" *Id.* (quoting State v. Oakley, 629 N.W.2d 200, 209 (Wis. 2001)).
62. *See id.* at 622.
63. *See id.*
64. *See id.* at 623.
65. *See id.*

should have applied the four-factor analysis highlighted by the Supreme Court in *Turner*.[66]

The Due Process Clause of the Fourteenth Amendment was created to protect individuals against deprivation of their fundamental rights.[67] The Ninth Circuit Court of Appeals and the en banc court both recognized that the right to procreate is an established fundamental right.[68] The en banc court had to decide whether it is a fundamental right that is inconsistent with incarceration,[69] which is where the two courts are split. The court of appeals found that it is consistent and, therefore, that the penological interests must be tested.[70] The en banc court, however, reasoned that case law implicitly held that the right to procreate is inconsistent with incarceration, and thus the interests need not be tested.[71]

The *Gerber* courts should have applied a different analysis. Rather than breaking up the analysis into two tests, they should have applied one test using the *Turner* factors to determine whether legitimate penological interests cause imprisonment to be fundamentally inconsistent with incarceration. There is no precedent for the courts' actions. Furthermore, the courts have not provided a reason why incarceration is inconsistent with the right to procreate.

B. Turner v. Safley *and the Four-Factor Reasonableness Test*

In *Turner*, the Supreme Court held that heightened scrutiny does not apply to prisoners' fundamental rights violations.[72] Instead, the Supreme Court advanced an intermediate standard, much like that which applies to gender cases involving the Equal Protection Clause.[73] The *Turner* Court stated that "when a prison regulation

66. *See* Turner v. Safley, 482 U.S. 78, 89–90 (1987).

67. *See* Dunn, *supra* note 43, at 2594.

68. The *Gerber* courts cited to Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); Carey v. Population Services International, 431 U.S. 678, 685 (1977); Stanley v. Illinois, 405 U.S. 645, 651 (1972); and Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

69. *See Gerber*, 291 F.3d at 620.

70. *See* Gerber v. Hickman, 264 F.3d 882, 888–89 (9th Cir. 2001).

71. *See Gerber*, 291 F.3d at 623.

72. *See* Turner v. Safley, 482 U.S. 78, 89 (1987).

73. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (applying an intermediate standard to determine the legitimacy of the state male and female drinking ages).

impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[74] The Supreme Court applied a four-factor test to determine reasonableness:

> First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it.... Moreover, the governmental objective must be a legitimate and neutral one....
>
> A second factor relevant in determining the reasonableness of a prison restriction... is whether there are alternative means of exercising the right that remain open to prison inmates....
>
> A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally....
>
> Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.[75]

The four-factor reasonable relationship test was subsequently used by the Eighth Circuit Court of Appeals in *Goodwin v. Turner*.[76] As mentioned earlier, this case involved facts similar to those of *Gerber*. The *Goodwin* court determined that it was not necessary to decide if the right to procreate is fundamentally inconsistent with incarceration because, according to application of the four-factor test, the restriction on procreation is reasonably related to legitimate correctional interests.[77]

The en banc court should have followed *Turner* and *Goodwin*[78] and applied the four-factor test instead of concluding that the right to procreate is inconsistent with incarceration. As the dissent in *Gerber* pointed out, the court made sweeping generalities about the nature of

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74. *Turner*, 482 U.S. at 89.
75. *Id.* at 89–90 (alteration in original) (citations omitted).
76. Goodwin v. Turner, 908 F.2d 1395, 1398–99 (8th Cir. 1990).
77. *See id.* at 1396.
78. While the en banc court agreed with the holding in *Goodwin*, it did not follow its reasoning and did not explain why. *See* Gerber v. Hickman, 291 F.3d 617, 620 (9th Cir. 2002).

incarceration, but never applied any reasons for the fundamental inconsistency to the facts of the case.[79] Additionally, the court claims that it took penological interests into account when making its decision.[80] If so, those interests should have been expressed specifically and made to withstand the four-factor test.

The court should have used the reasoning in *Goodwin* to find that the prohibition on artificial insemination is valid. The court chose to focus on the district court's reasoning in *Goodwin* rather than the decision by the Eighth Circuit Court of Appeals, which is good law.[81] In *Goodwin*, the court cited several prison interests including the burdens and expenses of treating men and women inmates similarly.[82] Likewise, the warden in *Gerber* asserted the interest of treating men and women equally, along with safety concerns when collecting semen and costs of adjudication for potential suits related to the procedure.[83]

The *Gerber* court should have balanced the penological interests against the four-step *Turner* analysis, as the *Goodwin* court did. The first consideration is the interest of treating men and women alike.[84] In step one, the objective underlying the regulation must also be neutral, legitimate, and rationally related to that objective.[85] In *Goodwin*, the court found that step one[86] was satisfied. Equal

79. These generalities included citations to cases and governmental interests that were never applied to the facts of the case. *See id.* at 624.

80. *See id.* at 620.

81. The district court's reasoning was disregarded in the en banc court's decision. *See id.*

82. *See Goodwin*, 908 F.2d at 1400. The *Goodwin* court held that all the other interests asserted by the prison were not relevant to Goodwin's specific request to artificially inseminate his wife. *See id.*

83. *See* Gerber v. Hickman, 264 F.3d 882, 890 (9th Cir. 2001).

84. The court skirted the issue of treating men and women equally by indicating that men and women are biologically different and thus, the equality of the sexes is not an issue. *See id.*; *see also* Jeri Munsterman, *Procreation From Prison via Fedex and the Extension of the Right to Imprisoned Women*, 70 UMKC L. REV. 733, 740 (2002) (arguing that Goodwin's right to procreate should survive incarceration). On remand, however, the court of appeals did not address the issue specifically. Because this equality issue is an interest that the warden cited to, it must be measured against the reasonable relationship test of *Turner*.

85. *See Gerber*, 264 F.3d at 890.

86. "There must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."

treatment of the sexes is a neutral and legitimate objective that is required under the Equal Protection Clause of the Constitution. The *Goodwin* court reasoned that allowing a man to procreate would force the prison to allow a female inmate the same right, and a pregnant prisoner would require:

> 'special medical services which may or may not be available within the institution, special diet, exercise, and other pre- and post-natal care.' . . . Therefore, pursuant to Bureau policy of treating all prisoners the same, to the extent possible, male prisoners cannot be allowed to procreate while incarcerated because the Bureau cannot afford to expand its medical services for its female prisoners to accommodate their desire to procreate.[87]

The second consideration is whether there are any alternative means of exercising the right to procreate.[88] There are clearly no other viable options of procreation since Gerber does not have the right to conjugal visits.[89] However, the fourth step of the *Turner* test states that "the absence of ready alternatives is evidence of the reasonableness of a prison regulation."[90] As the court in *Goodwin* stated, "The lack of such alternative avenues stems from the fact that none can exist without compromising prison policy or expending a large amount of prison resources accommodating the requests of its female prisoners. This absence of ready alternatives constitutes evidence of the reasonableness of the Bureau's policy."[91]

The last consideration is whether the right to procreate will have a substantial impact on other inmates, guards, and prison resources.[92] As the *Goodwin* court reasoned in step one, allowing women the right to procreate by artificial insemination would create a substantial burden on prison resources.[93] Specifically, it would divert resources away from the interests of inmate security and facility upkeep.[94]

Turner, 482 U.S. at 89.

87. *Goodwin*, 908 F.2d at 1400.
88. *See Turner*, 482 U.S. at 90.
89. *See* Gerber v. Hickman, 103 F. Supp. 2d 1214, 1216 (E.D. Cal. 2000).
90. *Turner*, 482 U.S. at 90.
91. *Goodwin*, 908 F.2d at 1400.
92. *See Turner*, 482 U.S. at 89–90.
93. *See Goodwin*, 908 F.2d at 1400.
94. *See id.*

Additionally, guards would have to give special treatment to the pregnant inmate.[95]

Allowing this kind of procedure would create a "ripple effect" that would burden the entire prison system.[96] Thus, applying the analysis of the *Turner* Court with the reasoning of the *Goodwin* court, the regulation imposed in *Gerber* should be upheld.[97]

Although not binding, the *Goodwin* reasoning is extremely persuasive and should have been applied by the *Gerber* court. By implementing the *Goodwin* analysis, the court would invoke a rational approach rather than an arbitrary analysis that gives no guidelines for future decisions. The explicit policy concerns and penological interests are so "inexorably intertwined with the initial question whether a right exists"[98] that without applying the *Turner* test an accurate conclusion cannot be reached. The court clearly wanted to find the prohibition valid and relied on scattered precedent to reach such a conclusion.

V. THE FUTURE OF *GERBER V. HICKMAN*

The en banc court did not provide future courts with an applicable standard to use when determining whether a fundamental right is inconsistent with incarceration. Further, if the *Gerber* decision is reviewed on appeal by the U.S. Supreme Court, the decision will likely be overturned. Alternatively, its reasoning is likely to be discredited because the court failed to provide reasons

95. *See id.*

96. *Id.*

97. The interest of treating men and women the same is the only interest the *Gerber* court cites to that would survive step one of the *Turner* test. There are no other legitimate safety concerns because the process only requires a container and permission to ejaculate into that container. As the court of appeals noted, it would be too attenuated to suggest that there would be any security issues since the prisoner is not making contact with any other inmates or his non-inmate spouse. *See Gerber*, 264 F.3d at 891. The interest of avoiding costly litigation by female prisoners wanting to have a child (or due to mishandling of semen) is also not rationally related to the specific request of Gerber because, as the court in *Goodwin* points out, it has nothing to do with prison administration. *See Goodwin*, 908 F.2d at 1400.

98. *Recent Case: Constitutional Law—Due Process—Prisoners' Rights Ninth Circuit Holds that the Right to Procreate Survives Incarceration*—Gerber v. Hickman, *264 F.3d. 882 (9th Cir. 2001).*, 115 HARV. L. REV. 1541, 1545 (2002).

specific to the regulation against artificial insemination. The court should have set the standard in the Ninth Circuit and applied the U.S. Supreme Court's reasonable relationship test in *Turner* to determine whether there are legitimate penological interests that make the fundamental right inconsistent with incarceration.

While *Turner* actually states that a prisoner "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system,"[99] other courts have interpreted it as the standard for which to conclude whether a constitutional right is inconsistent with incarceration. For example, the Eighth Circuit interpreted the *Turner* test as the appropriate standard for reviewing a prison restriction on an inmate's fundamental constitutional right.[100] In order to make a rational decision, the *Gerber* court should have followed the Eighth Circuit's lead and applied the *Turner* test.

VI. CONCLUSION

Whether through traditional means or artificial insemination, having a child is a fundamental constitutional right. Prisoners, however, are only afforded those fundamental rights that are consistent with incarceration. Therefore, the issue is which rights survive incarceration. The test to determine whether or not a right survives imprisonment should be the reasonable relationship test implemented in *Turner*. Since the court in *Gerber* did not apply this test and instead relied on generalities, it undermined its opinion and resulted in an inadequate response to the concerns of dissenters.

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99. Turner v. Safley, 482 U.S. 78, 95 (1987).

100. *See Goodwin*, 908 F.2d at 1400.

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